May 18, 1998

D.T.E. 98-35

Investigation by the Department into an arbitrated interconnection agreement between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, and AT&T Communications of New England, Inc., pursuant to § 252(e) the Telecommunications Act of 1996.

APPEARANCES: Bruce Beausejour, Esq.
185 Franklin Street, Room 1403
Boston, MA 02210-1585
FOR: NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY d/b/a BELL ATLANTIC-MASSACHUSETTS
Petitioner

Jeffrey F. Jones, Esq.
Palmer & Dodge
One Beacon Street
Boston, MA 02108
FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
Petitioner

I. INTRODUCTION

On April 17, 1998, pursuant to § 252(e) of the Telecommunications Act of 1996 ("Act"), New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") and AT&T Communications of New England, Inc. ("AT&T") filed their final arbitrated interconnection agreement ("Agreement") for approval by the Department of Telecommunications and Energy ("Department"). The Department docketed its review of the Agreement as D.T.E. 98-35. Under § 252(e)(4) of the Act, the Department must approve or reject the Agreement within 30 days of the filing (i.e., by May 18, 1998), or it shall be deemed approved.

The Agreement includes both negotiated and arbitrated portions that set forth rates, terms and conditions under which Bell Atlantic and AT&T will interconnect their respective networks, as well as the network elements, services, and other arrangements that Bell Atlantic will provide to AT&T. The arbitrated rates, terms and conditions were determined by the Department in a series of Orders in the Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94. On August 12, 1996, AT&T, pursuant to Section 252 of the Act, filed a petition for arbitration with the Department, which was docketed as D.T.E. 96-80/81. The docket was subsequently consolidated with four other petitions for arbitration, thus establishing the Consolidated Arbitrations docket. Consistent with the deadlines under the Act, the Department completed the arbitration of all issues then identified by the parties in the Consolidated Arbitrations by December, 1996. See Consolidated Arbitrations, Phase 1 Order (November 11, 1995), Phase 2 Order (December 3, 1996), Phase 3 Order (December 4,

1996), and Phase 4 Order (December 4, 1996). Following the issuance of certain subsequent Orders concerning Bell Atlantic compliance filings and motions for reconsideration or clarification, the Department ordered the parties to the Consolidated Arbitrations to work out contract language for the arbitrated provisions, and to submit to the Department final interconnection agreements containing both negotiated and arbitrated provisions. See Consolidated Arbitrations, Phase 2-A (February 5, 1997); Phase 3-A (February 5, 1997); Phase 4-A (February 5, 1997); Phase 4B/2B (June 2, 1997). On June 18, 1997, AT&T and Bell Atlantic filed a proposed Agreement with the Department, but indicated that, after negotiations on contract language, there were new issues that needed to be arbitrated.[1] On August 29, 1997, the Department issued an Order deciding these additional AT&T/Bell Atlantic-specific issues, and required AT&T and Bell Atlantic to submit a final interconnection to the Department for approval. See D.P.U. 96-80/81, at 11 (1997). AT&T and Bell Atlantic indicated that they needed considerable additional time to negotiate contract language

---

[1] In the June 18, 1997 filing, AT&T and Bell Atlantic identified those issues as: (1) whether Bell Atlantic should be permitted to charge AT&T for development costs associated with implementing the Alternate Billing To Third Number arrangements; (2) how service standards should be stated in the Agreement; (3) whether Bell Atlantic should be permitted to use aggregated reseller data for any legitimate business purpose; (4) whether Bell Atlantic should be able to include in the Agreement a general commercial disclaimer of all express or implied warranties that have not be specifically set forth in the Agreement; (5) how AT&T should contribute to funding E-911 and TDD/TTY message relay services when it provides its own directory assistance service; (6) whether AT&T should be bound by the terms of Bell Atlantic's collocation tariffs; (7) whether AT&T should be able to request larger collocation cage sizes than those offered by Bell Atlantic; and (8) whether Bell Atlantic will provide AT&T access to its rights-of-way, conduits, ducts, and pole attachments.

concerning the Department-arbitrated provisions as well as to complete preparations of the final interconnection agreement. In the meantime, AT&T and Bell Atlantic, along with the other parties to the Consolidated Arbitrations, participated in ongoing arbitration proceedings concerning performance standards and liquidated damages, and the arbitration of newly-identified issues, including dark fiber rates, collocation rates, operation support systems and non-recurring costs, and unbundled network elements ("UNE") combinations. Those issues continue to be arbitrated. On April 17, 1998, AT&T and Bell Atlantic filed a final interconnection agreement that includes ?placeholders" to incorporate the Department's arbitrated decisions on those issues, when determined.

Pursuant to notice duly issued, the Department held a public hearing in this proceeding on May 7, 1998. No comments were received at the public hearing. In addition, the Department received no written comments in response to its request for comments on the Agreement.

II. DESCRIPTION OF AGREEMENT

The Agreement, executed on April 13, 1998, is a comprehensive set of rates, terms and conditions governing the interconnection of Bell Atlantic's local exchange network with AT&T's network, including, inter alia: (1) access to and rates for resale of local services; (2) access to and rates for certain unbundled network elements or combinations of elements; (3) collocation; (4) number portability; (5) access to rights of way, ducts, conduits, and pole attachments; (6) access to directory assistance, operator services, and directory listings; (7) reciprocal compensation; (8) access to E911 and 911 services; (9) meet-point billing;

(10) dialing parity; (11) transient tandem service; (12) interconnection of AT&T's network to Bell Atlantic's network; and (13) access to telephone numbers (Agreement at 2). The Agreement has an initial term of three years, ending April 12, 2001 (id. at 3).

The Agreement contains provisions for more than 20 arbitrated issues, including provisions governing performance standards and liquidated damages (Agreement at 20), and prices for unbundled links, reciprocal compensation, interconnection, and the resale discounts (Agreement at 152-163). In addition, the Agreement contains "placeholders" for certain newly-identified issues which the Department is currently arbitrating.[2]

III. STANDARD OF REVIEW

Section 252(e)(1) of the Act requires parties to an interconnection agreement to submit the agreement to a state commission for approval, and further requires state commissions to approve or reject the agreement with written findings as to any deficiencies. The state commission may only reject negotiated portions of an agreement if it finds that (1) the agreement discriminates against a telecommunications carrier not a party to the agreement, or (2) the implementation of such agreement is not consistent with the public interest, convenience, and necessity.[3] 47 U.S.C. § 252(e)(2)(A).

The state commission may only reject arbitrated portions of an agreement if it finds that

---

[2] AT&T and Bell Atlantic shall submit for Department approval the contract language for "placeholder" provisions after the Department issues its Order on those provisions.

[3] In NYNEX/MFS Agreement, D.P.U. 96-72, at 15-16 (1996), the Department rejected arguments that negotiated terms should be subject to the requirements of 47 U.S.C. § 251 relating to arbitrated terms.

the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the Federal Communications Commission ("FCC") pursuant to Section 251,[4] or the pricing standards set forth in Section 252(d) of the Act. 47 U.S.C. § 252(e)(2)(B). The state commission also may establish other non-price requirements in its review of an agreement, including service quality standards. 47 U.S.C. § 252(e)(3).

IV. ANALYSIS AND FINDINGS

A. Negotiated Provisions

Consistent with our review of prior negotiated interconnection agreements (see e.g., MFS/NYNEX Interconnection Agreement, D.P.U. 96-72 (1996)) and in accordance with the above standard of review, we find that the negotiated provisions of the Agreement do not discriminate against a telecommunications carrier not a party to the Agreement and implementation of the Agreement is consistent with the public interest, convenience, and necessity.

---

[4] The FCC issued regulations pursuant to Section 251 of the Act in its First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, adopted August 1, 1996 (released August 8, 1996) ("First Report and Order"). On July 18, 1997, the United States Court of Appeals for the Eighth Circuit, inter alia, vacated the FCC's pricing rules for interconnection, unbundled elements, reciprocal compensation, and resale because it determined that the FCC exceeded its jurisdiction in promulgating those rules. Iowa Utilities Board, et al. Petitioners, v. Federal Communications Commission; United States of America, Respondents, 120 F.3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997) ("Eighth Circuit Decision"). In addition, the Eighth Circuit vacated the "pick and choose" rule on the ground that it is "an unreasonable construction of the Act." Id. at 801.

The negotiated portions in the Agreement do not bind other carriers; other carriers are free to negotiate their own arrangements with Bell Atlantic. In addition, the negotiated portions in the Agreement meet the requirements of 47 U.S.C. § 252(i) by making interconnection to network elements, provided under the Agreement to AT&T, available to other telecommunications carriers on the same terms and conditions, if so requested (see Agreement at 4-5).

Moreover, the implementation of the negotiated portions in the Agreement is consistent with the public interest, convenience, and necessity. These provisions, which account for the majority of the Agreement, were the product of good faith negotiations between Bell Atlantic and AT&T.

Accordingly, the Department hereby approves the negotiated provisions of the Agreement. In approving these provisions, however, the Department makes no findings on the applicability of these terms and conditions to other interconnection agreements which may be submitted for Department review in the future.

B. Arbitrated Provisions

Before addressing the substantive issues, it is important that we discuss the impact on our analysis of the Eighth Circuit Decision, which, as of the date of this Order, is on appeal to Supreme Court of the United States.[5] As we stated in Brooks Fiber/NYNEX Interconnection Agreement, D.P.U. 97-70 (1997), "the Eighth Circuit struck down the FCC's pricing rules,

---

[5] AT&T Corp., et al. v. Iowa Utilities Board, et al., __ U.S. __, 118 S. Ct. 879 (1998).

including its TELRIC methodology for unbundled elements and avoided cost methodology for the resale discount, on jurisdictional grounds only and made no findings with respect to whether those methods complied with the pricing standards of Section 252(d)." D.P.U. 97-70, at 7. Because only the jurisdiction of the FCC to establish pricing requirements was challenged, and not the underlying pricing methods, the Department found that it could continue to rely on those methods, which were used in the Consolidated Arbitrations, in reviewing final arbitrated interconnection agreements. Our use of these pricing methods will continue unless we determine that the interim rates established through those methods are no longer appropriate for setting rates for interconnection UNEs, reciprocal compensation, and resale, at least on an interim basis. See Phase 2 Order at 4-8 (1996).

In D.T.E. 98-15, the Department currently is investigating whether the interim resale discounts should be made permanent or whether other discounts, based on a different methods, are more appropriate. In addition, the Department is considering an AT&T motion in that docket to expand the scope of D.T.E. 98-15 to include developing permanent rates for unbundled elements. However, until the Department changes the interim resale discounts and UNE rates, those rates remain in effect. Accordingly, the Department finds that its use of the interim resale discounts and UNE rates in the Consolidated Arbitrations, and included in the Agreement under review in this proceeding, are still valid, and are not affected by the Eighth Circuit Decision. Further, as with all other Bell Atlantic negotiated and arbitrated agreements in which interim rates are used, the interim rates contained in this Agreement are subject to change based on the results of D.T.E. 98-15 and other subsequent Department investigations,

and AT&T and Bell Atlantic shall be required to incorporate such results as amendments to their agreements.

With respect to the arbitrated terms of the Bell Atlantic/AT&T Agreement, the Department determines that the arbitrated portions of the Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC in the First Report and Order. The Department also finds that the arbitrated pricing arrangements in the Agreement meet the pricing standards set forth in Section 252(d) of the Act.[6] However, as noted above, in light of the Eighth Circuit Decision vacating the FCC's pricing rules, there is no need for the Department to consider whether the arbitrated rates conform to the requirements of those rules.

Finally, having reviewed the contract language of the arbitrated provisions and compared that language to the applicable Department arbitrated decisions, and we find consistent with our review of prior arbitrated agreements in, e.g., ACC National Telecom

---

[6] Section 252(d) states, inter alia, that charges for interconnection and network elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and … nondiscriminatory, and … may include a reasonable profit"; that charges for transport and termination of traffic shall "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" … and shall be based on "a reasonable approximation of the additional costs of terminating such calls"; and that the wholesale rates shall be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."

Corp., D.P.U. 97-85 (1997), that the parties have correctly incorporated the relevant portions of those arbitrated decisions into the Agreement. Accordingly, for the reasons stated, the Department also approves the arbitrated portions of the Agreement.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the final arbitrated interconnection agreement, between New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts and AT&T Communications of New England, Inc., filed with the Department on April 17, 1998, be and hereby is approved; and it is

FURTHER ORDERED: That Bell Atlantic and AT&T comply with all directives contained herein.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner